

Tuesday 1, November 2016

Will campaign cash corrupt the state Supreme Court?

by [Lester Black](#)
Seattle Crosscut

A late-October bombardment of spending from some of Washington's richest people, aimed at depriving State Supreme Court Justice Charlie Wiggins of another term, is making headlines, and jostling the preconceptions of many people that judicial campaigns are sleepy affairs. This latest donation drop has some peculiarities – it's strange to see Bill Gates on the same team as one of Donald Trump's biggest donors. But the amount of money in this year's Supreme Court races is far from unusual.

In the past decade, four election cycles have generated over a million dollars for Washington Supreme Court campaigns, according to a Crosscut analysis. Candidates have netted over \$2.5 million this year, which is still short of 2006, when over \$3.8 million was spent on the state's Supreme Court races.

The cash infusion is being driven by what's at stake in the coming year, both financially and ideologically. There is continued activity around the Supreme Court's 2012 McCleary decision, which requires the state legislature to fully fund public education, and will cost billions. Further, the court ruled last year that charter schools are unconstitutional, angering the thousands of families already enrolled in these schools across the state, as well as those who believe the schools are key to reforming the state education system.

In the 1980s and 1990s, Supreme Court elections were fairly sleepy affairs. But that changed in the 2000s, when wealthy interest groups across the country — like the billionaires behind this late-October spending blitz — started realizing the stakes of these Supreme Court elections, and created a boom in judicial campaign spending across the country. Only \$83.3 million was raised for Supreme Court campaigns across the country in the '90s. The following decade, that number jumped to \$206.9 million, according [to an Emory Law School study](#).

And there's a growing body of academic research that shows a direct correlation between who gives money to a judge's election campaign and how that judge presides on the court.

Billionaire bedfellows

Washington is one of 12 states where the position of Supreme Court judge is non-partisan, meaning no party preference appears next to their name on ballots. That

distinction certainly doesn't pull the politics out of the process, but without allegiance to a certain party it allows non-traditional alliances to form behind judicial candidates.

Take this recent spat of campaign spending against Supreme Court Justice Charlie Wiggins, which has made billionaires from both sides of the aisle into bedfellows. The ostensibly progressive Microsoft crew of Bill Gates, Steve Ballmer and current Microsoft president Brad Smith — as well as Paul Allen's company Vulcan — have teamed up with conservative billionaire Ken Fisher and developer Kemper Freeman to spend over \$889,000 in just ten days to unseat Wiggins. This money is being channeled into independent political action committees that are running both attack ads against Wiggins and ads supporting his opponent Dave Larson.

What's uniting these mega-wealthy individuals? The people behind the billionaire-funded PACs point to the McCleary and charter school decisions and say the current court is producing judicial activism.

"This current court is one that has become too extreme, too polarizing, too activist in its decisions. That absolutely weighed in on our decision-making in this contest," said Michael Davis, president of Enterprise Washington, the PAC which released [a positive ad](#) supporting Larson.

Enterprise Washington received \$200,000 from Bill Gates and \$300,000 from Paul Allen's Vulcan Inc., both on October 17.

A separate PAC, called Judicial Integrity WA, has focused on attacking Wiggins. Judicial Integrity received \$350,000 from Ken Fisher, a conservative billionaire investor that also donated \$25,000 to Donald Trump's fundraising committee. The organization [is running ads](#) focused on a court decision for which Wiggins wrote the majority opinion, which freed a man previously convicted of possessing child pornography. A lower appeals court had reversed the conviction, based on the belief police violated the man's constitutional rights when they found the pornography.

Wiggins, along with four other Supreme Court Justices, maintained the lower court's ruling. That man was [arrested again this month](#) for allegedly attempting to solicit sex from a minor.

Larry Shannon, who works for Washington State Association for Justice and is helping coordinate the independent effort to reelect Wiggins, said it's troubling to see a handful of wealthy people try to change the court.

"I am disturbed by the notion that basically you have five billionaires that are trying to swing the judiciary," Shannon said.

The Seattle Times endorsed Larson but has come out against Judicial Integrity's attack ad, calling it a piece of "[vicious mudslinging](#)."

Independent spending has increased from eight percent of total spending in 2001-2002 to 42 percent a decade later, according to [a 2014 study by Emory Law School](#). As the amount of independent spending has dramatically increased in judicial elections across the country, attack ads are becoming more common.

In the 2011-2012 election cycle, only 2.3 percent of TV ads paid for by the candidate's campaigns were negative, while 44 percent of those bought by independent groups were negative.

These election tactics are having an effect on how the courts rule in criminal cases, according to the study, causing a statistically significant decreased probability of justices voting in favor of criminal defendants.

"The recent growth in independent expenditures has made judicial campaigns more negative and intensely fought," Michael Kang, one of the study's authors, wrote to Crosscut in an e-mail. "We find that attack ads tend to make state supreme court justices more hostile to criminal defendants in criminal appeals."

A corrupting influence?

And this isn't the only type of influence that money is exerting over judicial decisions. Studies show a relationship between who gives money to judicial candidates and how those candidates decide cases.

[A 2006 New York Times report](#) examined how judges on Ohio's Supreme Court ruled when they heard cases that involved donors to their campaigns. Less than 10 percent of judges recused themselves from cases that involved one of their donors and, on average, judges sided with their contributors 70 percent of the time.

[A 2013 study by Joanna Shepherd](#), a professor of law at Emory University, found that candidates who received money from business groups overwhelmingly sided with business interests. Shepherd found that if a successful judicial candidate received half of their contributions from pro-business groups, they would vote in favor of business interests two-thirds of the time. Shepherd wrote in the study that there was "a predictive relationship between contributions to judges and judicial decisions favorable to contributors."

There are some inherent difficulties in analyzing the effect of contributions on judicial decisions: a judge's financial supporters are likely choosing their candidate based on shared judicial ideologies, so a judgement in favor of that ideology doesn't necessarily mean it was bought by campaign donations. For example, the Chamber of Commerce will likely only support judges that have pro-business ideologies, so a Chamber-supported judge writing a pro-business judgement doesn't establish a causal link between the donation and the judgement.

Shepherd realized this difficulty, and therefore conducted [another study](#) that looked only at election-related cases in state Supreme Courts. These cases, which often involve technical details like candidate eligibility or specific ballot counting questions, are unlikely to establish a precedent for the future, so the judgement is only concerned with immediate interests, according to the authors.

The study found a clear relationship between the judge's party leaning and the decision they made: Democrat judges were more likely to side with Democrats and Republican judges were more likely to side with Republicans. Interestingly, that relationship went away when judges knew they were not going to run for reelection due to term limits or mandatory retirement ages.

Shepherd and her co-author claim that if party loyalty has an effect in these technical election cases, it is likely to influence other cases as well.

"If judges are influenced, consciously or not, by party loyalty in election cases, they are likely tempted to do so in other types of cases as well, even if it is methodologically difficult to prove the role partisanship plays," the authors wrote. "This study likely exposes just the tip of the proverbial iceberg."

Has the rest of iceberg begun showing itself in Washington, with a handful of ultra-wealthy individuals attempting to change the state's court of last resort? Shannon, the official with Washington Association for Justice trying to re-elect Wiggins, said he's always supported the direct election of justices. This year, however, has raised some red flags for him.

"This has been a debate across the country, about the judicial selection systems and the relative merits of them," Shannon said. "And I've always been the one that stood up for elections, but I always said maybe someday I would change my mind if we see this corrupting influence (of money) we've seen across the country."

This story has been updated since it first appeared to correct who Larry Shannon supports.